

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA HUFFMAN,

Plaintiff-Appellant,

v

TACO BELL CORPORATION,

Defendant-Appellee.

UNPUBLISHED

August 23, 2002

No. 232950

Oakland Circuit Court

LC No. 00-021453-NO

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendant under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a job coach, assisted disabled employees with their duties at various worksites, including defendant's Wixom restaurant. One of the workers she assisted was responsible for cleaning the parking lot with a long-handled industrial dustpan. Plaintiff had previously noticed that the handle, which fit into a hole at the top of the dustpan, kept coming off and she had asked the restaurant's management to order a new one. On the day in question, she watched the worker using the old dustpan for approximately ten minutes and saw that the handle fell off each time he set it down. She then located the newly ordered dustpan in a storage area and took it out to him. As plaintiff went back to the restaurant carrying the old one by the handle, the dustpan fell off and she tripped on it. She broke her ankle as a result of her fall.

Plaintiff filed suit, alleging that defendant failed to maintain a reasonably safe premises by allowing an invitee to use a dangerous and defective dustpan. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it owed no duty to plaintiff because the condition of the dustpan was open and obvious and did not pose an unreasonable risk of harm. The trial court granted the motion, finding as a matter of law that the undisputed evidence showed that plaintiff was aware of the condition of the dustpan and that the risk of harm it posed was not unreasonable.

This Court's review of a decision regarding a motion for summary disposition is *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. In deciding a motion brought under this subrule, the trial court considers the documentary evidence submitted by the parties in

the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Generally, the owner or possessor of land owes a duty to its invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The care required extends to instrumentalities on the premises that the invitee uses at the invitation of the premises owner. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). However, this duty does not generally encompass removal of open and obvious dangers. *Lugo, supra* at 516. Instead, the landowner is only required to protect an invitee from open and obvious dangers when “special aspects” of the condition make it unreasonably dangerous. *Id.* at 517.

Plaintiff contends that the affidavit of a safety expert opining that the dangerous condition of the dustpan was not open and obvious and that it posed an unreasonable risk of harm, combined with her own testimony that she only saw the dustpan handle fall out when the worker placed it on the ground, raised an issue of fact whether the open and obvious danger doctrine applied. We disagree. Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). On this record, it was undisputed that plaintiff knew the dustpan’s condition and there is no doubt that a casual inspection would reveal that the handle was apt to separate from the dustpan when carried.

Plaintiff also contends that the expert’s affidavit created a question of fact whether the dangerous condition of the dustpan posed an unreasonable risk of harm. Even accepting the affidavit as more than a series of conclusory statements, it did not raise a genuine issue of material fact. In *Lugo, supra* at 517, the Court held that a landowner is not required to protect an invitee from an open and obvious danger unless “special aspects” of the condition make it unreasonably dangerous. Special aspects that serve to remove a condition from the open and obvious doctrine are those conditions that “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided.” *Id.* at 519. By way of illustration, the *Lugo* Court cited unavoidable standing water and an unguarded thirty-foot pit in a parking lot. *Id.* at 518. In this case, neither plaintiff’s testimony or the affidavit showed any aspect of the dustpan that would rise to the level of a “special aspect” as the term was used in *Lugo*. The trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Helene N. White

/s/ Janet T. Neff

/s/ Kathleen Jansen